Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

DeETTA JOHNSON, Individually and as Conservator of the Estate of Wanda Johnson, and as Next Best Friend of Domiauant Johnson, a Minor,

Petitioner,

v.

METHODIST MEDICAL CENTER OF ILLINOIS,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether F.R.Civ.P. 56 permits a finding that a plaintiff is subject to summary judgment where the deposition testimony indisputably raises genuine issues of material fact regarding a defendant's negligence, but the complaint on file does not dovetail with the specific allegations of negligence demonstrated.

2. Whether a district court abuses its discretion under F.R.Civ.P. 15 when it denies a motion to amend a complaint to comport the pleadings to the proof, where discovery is still open, the defendants have not yet been made to disclose their experts and no trial date has been set.

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METHODIST MEDICAL CENTER OF ILLINOIS,

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Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

DeEtta Johnson respectfully petitions this Court for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit. Petitioner seeks the reversal of that court's affirmance of an order granting summary judgment to a defendant hospital in a complex medical malpractice action. Upon remand, petitioner should be allowed to amend her complaint to conform the pleadings to the proof.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming the district court's grant of summary judgment to respondent, Methodist Medical

Center ("Methodist" or "Respondent"), is reported at 10 F.3d 1300 (7th Cir. 1993) and set forth in the Appendix, *infra*, at App. 1-12. The court's order denying petitioner's Petition for Rehearing with Suggestions for Rehearing En Banc is set forth in the Appendix, *infra*, at App. 13.

The district court's order granting summary judgment to Methodist is set forth in the Appendix, *infra*, at App. 14-25. That court's order denying petitioner's motion for reconsideration is set forth in the Appendix, *infra*, at App. 26. The court's order adding Rule 54(b) language is set forth in the Appendix, *infra*, at App. 27-28.

JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming the district court's order granting summary judgment to Methodist, was entered on December 1, 1993. That court's order denying petitioner's Petition for Rehearing with Suggestions for Rehearing En Banc was entered on December 28, 1993.

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Rule 8. General Rules of Pleading

> (a) **Claims for Relief.** A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain
>
> * * * *
>
> (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . .

Rule 15. Amended and Supplemental Pleadings

(a) **Amendments.** . . . [A] party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. . .

Rule 56. Summary Judgment

(b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon.** . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .

STATEMENT OF THE CASE

On March 18, 1988, petitioner, a California resident, filed the subject medical malpractice action on behalf of her incompetent daughter, Wanda Johnson ("Wanda"). Wanda had suffered permanent injury while a patient at Methodist, a hospital located in Illinois, where she had gone, on June 30, 1982, to deliver a baby. Petitioner named Methodist and several physicians (not parties to this petition or the appeal below) as defendants in her lawsuit.

The district court's jurisdiction was founded on 28 U.S.C. § 1332(a).

On June 16, 1989, petitioner obtained leave to amend her complaint to add new party defendants. On August

7, 1989, she filed a second amended complaint, to correct an obvious pleading error occurring in the amended complaint.

Respondent moved to dismiss Count I of this second amended complaint, asserting that it did not comply with F.R.Civ.P. 8(a). On November 8, 1989, the magistrate assigned to the case denied the motion and held that the specific allegations of respondent's negligence could be flushed out through discovery. The court adopted this holding on January 2, 1990.

Petitioner disclosed her expert, Dr. Zatuchni, on May 14, 1990, but defendants waited over fifteen months to depose him. Petitioner disclosed an additional expert, Mr. Nellis, on December 7, 1990, but defendants waited over seven months to take his deposition. Both experts rendered numerous specific opinions regarding respondent's negligence. These allegations were not encompassed by the specific allegations of negligence appearing in the second amended complaint.

On November 25, 1991, respondent moved for an extension of time in which to disclose its experts. Two days later, it moved for summary judgment, based only on the "charges of negligence alleged in the Second Amended Complaint." Respondent conceded that its motion did "not address matters mentioned in discovery but not charged against us in the pleadings."

In response, petitioner sought leave to file a third amended complaint. This proposed complaint would have obviated respondent's motion for summary judgment by conforming the pleadings to the evidence previously adduced. Respondent objected; the district court denied petitioner's motion. Thereafter, the district court granted summary judgment to respondent. Petitioner filed a motion

for reconsideration; it too was denied, but the court granted petitioner's request for entry of final judgment under Rule 54(b).

On appeal, the circuit court held that the district court did not abuse its discretion in denying petitioner's motion for leave to file a third amended complaint and that summary judgment was properly granted to respondent. As to summary judgment, the court reasoned:

> With respect to the claims in the second amended complaint, plaintiff failed to present any evidence showing genuine issues of material fact. When plaintiff chose to plead very specific negligent acts and failures, and delayed the pleading of additional acts and failures, she gave up any argument that Methodist had to show the nonexistence of issues of fact as to the proposed additional claims as well.

(App. 10-11.)

REASONS FOR GRANTING THE WRIT

I.

THE CIRCUIT COURT'S OPINION IS CONTRARY TO ALL LEGAL PRECEDENT. IT IGNORES THE DICTATE OF F.R.CIV.P. 56, WHICH REQUIRES A COURT TO EXAMINE "THE PLEADINGS, DEPOSITIONS, ANSWERS TO INTERROGATORIES, AND ADMISSIONS ON FILE, TOGETHER WITH THE AFFIDAVITS, IF ANY" TO DETERMINE WHETHER A GENUINE ISSUE OF MATERIAL FACT EXISTS.

The Seventh Circuit cited no authority for its sweeping holding that the district court was not obligated to consider the deposition testimony of record in ruling on this motion for summary judgment, since the petitioner had pleaded specific allegations of negligence and the proof did not conform to the pleading.

The circuit court reshaped the law of summary judgment when it ignored the abundant evidence of respondent's negligence in this case. Simply stated, the court treated this case as if it concerned an appeal under F.R.Civ.P. 12 instead of a review of an order granting summary judgment. Without citation to a single summary judgment case, the court announced that by pleading specific facts instead of utilizing notice pleading, plaintiff had overpleaded her case and thus waived her right to change her theory of negligence.

This harsh result is unprecedented. This appeal should not have turned on the pleadings. There is no authority for ruling that a motion for summary judgment should turn on the particulars of the pleadings. F.R.Civ.P. 56 expressly states that the court should examine "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any" to determine whether a genuine issue of material fact exists. Here, it is undisputed that the depositions presented genuine issues of material fact.

The court wrongly ignored the testimony of Dr. Zatuchni, plaintiff's expert obstetrician-gynecologist. He testified that Wanda's infection, which caused her to suffer seizures and permanent brain damage, was introduced by respondent's nurses, who deviated from the standard of care by conducting repeated vaginal examinations on Wanda after her water bag had been broken. The court also ignored the testimony of Mr. Nellis, plaintiff's expert hospital administrator. He added that respondent's nurses deviated from the standard of care by not reporting Wanda's deteriorating condition and by inadequately charting her course.

The circuit court's analysis of this summary judgment issue rested only on *American Nurses' Ass'n v. State of Ill.*, 783 F.2d 716 (7th Cir. 1986). That case, however (notably cited only as "*Cf.*"), does not support the court's decision. The particular holding quoted—"A plaintiff who files a long and detailed complaint may plead himself out of court by including factual allegations which if true show that his legal rights were not invaded." (App. 10)—related to the court's analysis of a defendant's motion to dismiss a complaint *on the pleadings*, pursuant to F.R.Civ.P. 12(b)(6). *American Nurses'* is inapplicable to *Johnson* for another reason. Nothing about the *Johnson* complaint showed that the factual allegations, if true, "show[ed] that [Johnson's] legal rights were not invaded."

The case should have proceeded as contemplated by the rules, and the issues should have been crystallized by the final pre-trial memorandum.

II.

THE STRONG DIRECTIVE OF THE CIRCUIT COURT'S OPINION CONFLICTS WITH THE LIBERAL INTENT OF F.R.CIV.P. 8(a) AND THE CONCEPTS EMBRACED BY THE NEWEST AMENDMENTS TO THE FEDERAL RULES.

The circuit court's message is plain: follow the three paragraph form complaint appended to the Federal Rules of Civil Procedure or risk being thrown out of court on an ultra-technical interpretation of the federal rules. This result is contrary to the liberal intent of the rules. *See e.g. Conley v. Gibson*, 355 U.S. 41, 48 (1957) ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.").

Recently, this Court unanimously quoted this holding from *Conley* approvingly. *Leatherman v. Tarrant County Etc.*, 113 S.Ct. 1160, 122 L.Ed.2d 517, 524 (1993).

The circuit court's message is in direct conflict with the thrust of the newest amendments to the Federal Rules of Civil Procedure. The amendment to F.R.Civ.P. 26, governing discovery disclosure, mandates automatic disclosure of the name "of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings." (F.R.Civ.P. 26(1)(A). It likewise requires automatic disclosure or copies of all relevant documents, a list of damages and insurance agreements. (F.R.Civ.P. 26(1)(B)(C)(D)). These disclosures must take place within 116 days of the complaint being served on a defendant. (F.R.Civ.P. 26(f) and 16(b).)

We submit, the opinion cannot be harmonized with these new amendments. There is simply no point in filing a generic negligence complaint when you have to disclose all of your evidence within a few months of that filing. On the other hand, filing a specific complaint can prove to be fatal if you later learn that your specific allegations are not the true basis of the negligence. Based on the standing opinion, it is not an abuse of discretion to deny a plaintiff the opportunity to amend a complaint to comport with the proofs even if discovery is open, experts have yet to be named and no trial date has been set!

If left to stand, this chilling opinion will engender confusion at the bar and bench and spawn endless litigation. The message should be recalled.

III.

THE CIRCUIT COURT'S OPINION MISAPPREHENDS THE PROCEDURAL HISTORY OF THIS CASE. A REVIEW OF THAT HISTORY DEMONSTRATES THAT ANY DELAY IN ATTEMPTING TO FILE A THIRD AMENDED COMPLAINT—TO CONFORM THE PLEADINGS TO THE PROOFS—WAS PRIMARILY OCCASIONED BY RESPONDENT'S DELAY TACTICS.

While we maintain that summary judgment should not have been granted under any circumstance, we also point out that petitioner's proposed third amended complaint would have obviated respondent's motion for summary judgment. This is uncontroverted. Thus, the circuit court's erroneous determination that the district court did not abuse its discretion in denying petitioner's motion to file the third amended complaint, must be addressed.

In reaching its conclusion on this point, the Seventh Circuit again cited no authority. More troubling, the court misapprehended all of the relevant procedural history which supported the conclusion that petitioner did not unreasonably delay the filing of her third amended complaint.

The circuit court emphasized the fact that the case had been on file for four years at the time petitioner sought to file a third amended complaint. (App. 8) A review of the docket sheet, however, demonstrates that any delay was primarily occasioned by respondent's repeated, time consuming and unsuccessful motions to dismiss the complaint, followed by its lackadaisical attitude toward taking petitioner's experts' depositions:

March 18, 1988	Petitioner files suit filed against Methodist, attending OB-GYN, Dr. Thompson, and infectious disease specialist, Dr. Doughty

April 4, 1988	**Methodist files Motion To Dismiss**
May 11, 1988	Petitioner files Objections to motions to dismiss
May 20, 1988	Defendants file Replies to Objections to motions to dismiss
May 26, 1988	Petitioner files further Objections to motion to dismiss of Dr. Doughty
July 28, 1988	**Magistrate Kaufman recommends dismissing Count IV of petitioner's Complaint; denies motion as to Counts I, II and III**
July 29, 1988	**Respondent Objects to Magistrate's Recommendation**
November 30, 1988	**Order filed: Court adopts Magistrate's Recommendation**
December 5, 1988	Respondent files Answer
June 16, 1989	**Petitioner files First Amended Complaint to add Dr. O'Connor**
July 28, 1989	Petitioner granted leave to file Second Amended Complaint; discovery schedule vacated
August 7, 1989	**Second Amended Complaint filed—no substantive changes**
August 22, 1989	**Respondent files Motion to Dismiss Second Amended Complaint**
September 12, 1989	Petitioner responds to this motion to dismiss
October 2, 1989	Respondent Replies to Petitioner's Response
November 8, 1989	**Magistrate Recommends Motion To Dismiss be denied—specific allegations of negligence to be flushed out in discovery**
November 21, 1989	Respondent files Answer

January 2, 1990	**Order filed: Court adopts Magistrate's Recommendation**
March 2, 1990	Scheduling Order: petitioner's experts to be deposed by end of May; defendants to name experts by 10/1/90 and be deposed by 1/1/91
May 14, 1990	**Petitioner discloses Dr. Zatuchni**
June 8, 1990	Minute Order: previous scheduling order vacated
December 7, 1990	**Petitioner discloses Mr. Nellis**
December 12, 1990	Minute Order: occurrence discovery to be completed by 4/15/91
January 7, 1991	**Petitioner files interrogatory answers re: Dr. Zatuchni and Mr. Nellis**
January 30, 1991	**Respondent notices up deposition of Mr. Nellis**
May 13, 1991	**Joint Motion to extend discovery deadline**
May 16, 1991	Petitioner files supplemental interrogatory answers re: Mr. Nellis
June 28, 1991	Minute Order re: new discovery deadlines; petitioner to depose experts by 9/30/91; defendants to name experts by 12/31/91
July 29, 1991	**Dr. Thompson notices up deposition of Dr. Zatuchni**
August 23, 1991	**Defendants depose Dr. Zatuchni for over 8 hours; he details 22 specific allegations of Methodist's own negligence**
September 16, 1991	**Defendants depose Mr. Nellis who details specific allegations of Methodist's negligence**

November 25, 1991	**Respondent moves to extend time to disclose experts**
November 27, 1991	**Respondent moves for summary judgment**
January 13, 1992	**Petitioner moves to file Third Amended Complaint**
February 4, 1992	Respondent objects to proposed filing of Third Amended Complaint
April 3, 1992	**Order: motion to file Third Amended Complaint denied**
April 22, 1992	Petitioner responds to motion for summary judgment
May 1, 1992	Respondent replies
May 11, 1992	Petitioner supplements response
May 14, 1992	Order: summary judgment granted to respondent

In sum, it took respondent 8½ months to file an answer to the original complaint; over 3 months to file an answer to the second amended complaint; 15 months to take the deposition of Dr. Zatuchni; and over 7 months to take the deposition of Mr. Nellis. Then, fully apprised of all petitioner's claims of negligence against it, respondent covered its bases and moved to extend the time to name its experts. Finally, it took a swing at summary judgment.

All this, the circuit court ignored. It likewise ignored the magistrate's recommendation, adopted by the district court, that the specific allegations of negligence could be flushed out in discovery—as they were. It also ignored the fact that at the time petitioner moved for leave to amend, discovery was still open, respondent had yet to name an expert, and a trial date had not been set.

The circuit court rationalized its result:

> As we view it, plaintiff chose to rest her claims against Methodist on the alleged negligence of the doctors, on the theory that they were Methodist's agents, and otherwise claimed very precise failures of Methodist's employees. When confronted by Methodist's motion for summary judgment, plaintiff realized that she would lose based on the specific claims contained in the second amended complaint. She therefor asked for leave to add a large number of new specific claims. *The choice to leave these claims out of the pleadings for so long a time after plaintiff must have known of them, suggests a doubt about being able to prove these failures or, if proved, that they caused Wanda's injuries.*

(App. 7-8; emphasis ours.)

The court's speculative conclusion was baseless. A more reasonable conclusion, and one that comports with the reality of the litigation, was that after defeating respondent's motion to dismiss the second amended complaint, petitioner's counsel reasonably relied on Magistrate Kaufman's ruling that the specific allegations of respondent's negligence could be flushed out in discovery. Counsel then vigorously proceeded to prove respondent's negligence. Dr. Zatuchni concluded that respondent's nurses had introduced the bacteria into Wanda's genital tract, and petitioner's counsel assumed that if he could amend the pleadings to conform to the proofs *after* trial, he certainly did not need to rush to amend the pleadings to catch up to the proof while engrossed in discovery.

Respondent's claimed prejudice was a sham. It was very clear after Dr. Zatuchni's lengthy deposition that petitioner's claims against respondent were compelling. Mr. Nellis shored up the claims. Respondent had not yet retained an expert to defend it. Instead of doing so, its counsel saw a window of opportunity and jumped through it. The result was quite a coup.

CONCLUSION

A miscarriage of justice has been had upon Wanda Johnson and all future litigants. Johnson is being punished for going beyond notice pleading and alleging specific acts of negligence that later turned out not to be the focus of her complaint. Had she filed a simple three paragraph complaint, summary judgment would have been unthinkable.

Petitioner never could have anticipated that summary judgment would be had where the evidence of respondent's negligence was so strong. Nor could she have anticipated that her motion for leave to amend the complaint would be denied. Discovery was open, defense experts had not been named and no trial date had been set.

A brain damaged plaintiff has been wronged and left without a remedy against a tortfeasor—a result long frowned upon in every jurisdiction. The message is chilling. And wrong.

WHEREFORE, for the foregoing reasons, petitioner prays that her Petition for Writ of Certiorari be granted, and that the opinion of the United States Court of Appeals for the Seventh Circuit be vacated and that the district court's order be reversed.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 92-2937

DE ETTA JOHNSON, Individually and as Conservator of the Estate of WANDA JOHNSON and as Next Friend of DOMIAUANT JOHNSON,

Plaintiff-Appellant,

v.

METHODIST MEDICAL CENTER OF ILLINOIS,

Defendant-Appellee.

Appeal from the United States District Court
for the Central District of Illinois, Peoria Division.
No. 88 C 1091—**Michael M. Mihm,** *Judge.*

ARGUED SEPTEMBER 29, 1993—DECIDED DECEMBER 1, 1993

Before POSNER, *Chief Judge,* CUMMINGS, *Circuit Judge,* and FAIRCHILD, *Senior Circuit Judge.*

FAIRCHILD, *Senior Circuit Judge.* Fourteen-year-old Wanda Johnson gave birth to her daughter at defendant-appellee hospital Methodist Medical Center of Illinois ("Methodist"). Wanda subsequently developed a brain disorder, and was later adjudicated incompetent.[1] Plaintiff

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[1] On February 19, 1988, Wanda was adjudicated incompetent and her mother, the plaintiff in this action, was appointed conservator of Wanda's estate.

commenced this medical malpractice action, alleging that Wanda was negligently treated at Methodist.[2] In addition to naming Methodist as a defendant, plaintiff alleges specific acts of negligence against three doctors individually. Those allegations are not before this court. The district court denied plaintiff's motion for leave to file a third amended complaint, and granted summary judgment in favor of Methodist. Although claims against the doctors remained outstanding, the court made the judgment final pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. Plaintiff challenges both rulings on her appeal from the district court's judgment. We affirm.

I. UNDISPUTED BACKGROUND FACTS

At 3:00 a.m. on June 30, 1982, Wanda was admitted to Methodist in labor. At 11:30 a.m., Dr. Robert Thompson, Wanda's obstetrician, performed a vaginal examination and ruptured Wanda's membranes. Additional vaginal examinations were performed. Dr. Thompson delivered Wanda's daughter by cesarean section at approximately 5:30 p.m. that day.

Following delivery, Wanda's blood pressure was significantly elevated, she began coughing up mucous, and she experienced intense abdominal pains. These symptoms, which continued and became worse over the next nine days, were apparently caused by a severe infection. On July 9, Dr. Thompson performed a partial hysterectomy. On July 14, Wanda endured a number of grand mal seizures. The next day, Dr. Thompson performed an exploratory laparotomy, during which he removed Wanda's ovaries and appendix. After this surgery, Wanda's infection was under control. However, Wanda displayed significant behavioral changes.

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[2] Jurisdiction is founded on diversity. Illinois law controls all substantive questions.

In addition to Dr. Thompson, other doctors were assertedly involved in negligent treatment of Wanda. Dr. Doughty, an internist who specializes in infectious diseases, saw Wanda at Dr. Thompson's request. Dr. O'Connor, also an internist who specializes in infectious diseases, saw Wanda while Dr. Doughty was on vacation. Plaintiff also refers to "residents," who worked under the supervision of the named doctors, as responsible for negligently treating Wanda.

Wanda remained at Methodist for two months. Now in her twenties, she currently functions at less than an eight-year-old level.

II. PROCEDURAL HISTORY

Plaintiff's former attorneys[3] obtained copies of Wanda's hospital charts on August 27, 1982, and July 2, 1985. Plaintiff commenced this action on March 18, 1988. In her first complaint, plaintiff alleged that Methodist, through Drs. Thompson and Doughty, negligently treated Wanda. Pursuant to § 2-622 of the Illinois Code of Civil Procedure, plaintiff's attorney filed an affidavit stating that he had consulted with physicians knowledgeable about the issues in this action, and that after reviewing Wanda's medical records, the physicians concluded that there was "a reasonable and meritorious cause for the filing of this action." The attached reports of the reviewing doctors conclude that Drs. Thompson and Doughty were negligent.[4]

On June 16, 1989, plaintiff filed a motion for leave to amend her complaint to include Dr. O'Connor and unnamed

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[3] The record is not clear as to when plaintiff retained her current attorneys, except that they were retained prior to commencement of this action.

[4] One report specifically discusses Dr. Thompson; one report specifically discusses Dr. Doughty; and one report goes into more detail regarding the problems of Wanda's treatment, but does not implicate any individuals by name or job description.

residents, whose involvement in Wanda's treatment was discovered during Dr. Doughty's deposition. On July 7, the court granted the motion and plaintiff filed her first amended complaint.

In her second amended complaint, filed August 7, 1989,[5] plaintiff alleged that Methodist, through Drs. Thompson, Doughty and O'Connor, unnamed residents, and operation of its infectious control program, negligently treated Wanda. Specifically, plaintiff alleged that Methodist was negligent by the: (1) failure of the three named doctors and residents to appropriately use antibiotics; (2) failure of Dr. Thompson and residents to obtain appropriate blood cultures; (3) failure of the three named doctors and residents to timely recognize/diagnose Wanda's pelvic catastrophe; (4) failure of Dr. Thompson and residents to timely recognize disseminated intravascular coagulation (a bleeding disorder); (5) failure to obtain a thorough assessment of Wanda's pelvic size or capacity; (6) failure to have an internal pressure catheter or gauge available; and (7) failure to identify Wanda's infectious disease. Thus, plaintiff alleged particular acts of negligence on the part of the named doctors and residents, as agents of Methodist (in numbers 1-4 above). Methodist could only be liable on these charges if the doctors were shown to be Methodist's agents. Plaintiff additionally made three specific allegations against Methodist which are not tied to a distinct individual (in numbers 5-7 above).

One of plaintiff's experts, Dr. Zatuchni, was deposed on August 23, 1991; on September 16, 1991, another expert, Mr. Nellis, was deposed.

On November 27, 1991, Methodist filed a motion for summary judgment. Methodist's motion was accompanied by documentation and legal argument to show that plaintiff's claims that the doctors and residents were agents of Methodist, and that Methodist's employees failed to obtain

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[5] The second amended complaint corrected inconsequential errors in plaintiff's July 7, 1989 first amended complaint.

a thorough assessment of Wanda's pelvic size or capacity, failed to have an internal pressure catheter or gauge available, and failed to identify Wanda's infectious disease, were without merit.

Plaintiff's initial response was to file a motion for leave to file a third amended complaint on January 13, 1992 ("the proposed complaint"); plaintiff maintained that the proposed complaint would render the summary judgment motion moot. In her motion, plaintiff requests leave to amend her complaint to include allegations with respect to the nursing staff and Methodist as an institution, which contentions surfaced during the depositions of Dr. Zatuchni and Mr. Nellis.

The proposed complaint alleges that Methodist, through Drs. Thompson, Doughty and O'Connor, unnamed residents, the nursing staff, and operation of the infectious control program negligently treated Wanda. Specifically, plaintiff makes the identical allegations contained in the second amended complaint, and additionally alleges, with respect to the nursing staff: (1) lack of communication between labor and delivery room nurses and medical staff; (2) failure to promptly communicate to Dr. Thompson and residents that Wanda's membranes had ruptured; (3) failure to communicate that the fetal monitor strips were improperly calibrated and in error; (4) failure to chart the rupture of Wanda's membranes; (5) failure to report to Dr. Thompson and residents a decrease in variability noted in fetal monitor strips; (6) negligent discontinuance of the fetal heart monitor; (7) negligent performance of numerous unnecessary vaginal examinations; (8) introduction of bacteria into Wanda's cervix; (9) failure to obtain a clinical evaluation of Wanda's labor progress; (10) negligent provision of morphine to Wanda; and (11) failure to adequately evaluate Wanda's vital signs.

With respect to the "hospital staff" (apparently referring to hospital employees), the proposed complaint alleges: (1) failure to communicate the serious nature of Wanda's condition to Dr. Thompson; (2) failure to perform a pelvic

examination; and (3) failure to treat Wanda's cervical infection until Dr. Thompson performed the hysterectomy.

Finally, with respect to the hospital as an institution, the proposed complaint alleges: (1) failure to timely transcribe the surgical note concerning the cesarean section; (2) failure to monitor and oversee the clinical activities of its nursing staff, residents, and house staff; (3) failure to have an attending physician available to provide continuous care; (4) failure to timely provide a documented medical record; (5) allowance of residents and medical trainees to perform clinical evaluations of Wanda without adequate supervision; (6) failure to provide required information on fetal monitor strips; and (7) failure to provide policies and procedures which would allow its nursing staff to apply proper nursing care.

On April 3, 1992, the court denied plaintiff's motion to amend, finding that it was too late in the proceedings to amend the complaint. On April 22, plaintiff filed her response to Methodist's motion for summary judgment. On June 26, the court granted Methodist's motion for summary judgment.

III. DISCUSSION

A. Motion to Amend Complaint

We review the district court's denial of plaintiff's motion for leave to file her proposed complaint for abuse of discretion; the denial will be overturned only if there was no justifying reason for it. *J.D. Marshall Int'l, Inc. v. Redstart, Inc.*, 935 F.2d 815, 819 (7th Cir. 1991).

Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend "shall be freely given when justice so requires." However, leave to amend is not to be automatically granted; the Supreme Court has explained that a court may deny a motion to amend because of "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the oppos-

ing party by virtue of allowance of the amendment, futility of amendment, etc. . . . ." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

Plaintiff's attorney argued to the district court that the proposed complaint's specific allegations were made to meet the summary judgment motion. Apr. 3, 1992 Tr. at 4. In answering the court's question of why an amended complaint had not been filed earlier, plaintiff's attorney answered that he did not feel it was necessary to make specific allegations in a complaint. *Id.* at 4-5. While unnecessary, plaintiff's attorney believed the specific allegations would make the issues clearer for everyone. *Id.* at 4-5, 7.

At a subsequent hearing on Methodist's summary judgment motion, and in the following written order, the district court noted that plaintiff's attorney failed to provide a valid explanation for why the complaint was not amended earlier. The court decided that four years after commencement of the action was too late to amend the complaint.

The district court concluded that the proposed complaint goes beyond the scope of the second amended complaint. Plaintiff herself acknowledges that "[t]hese allegations [of Methodist's negligence as exposed in plaintiff's experts' depositions by mid-September 1991] were not encompassed by the Second Amended Complaint." Mar. 30, 1993 Br. at 3. The proposed complaint brings in additional actors (*e.g.* the nursing staff), who took alleged actions (or inactions) that are distinct from the allegations raised in the second amended complaint (*e.g.* failure to communicate).

As we view it, plaintiff chose to rest her claims against Methodist on the alleged negligence of the doctors, on the theory that they were Methodist's agents, and otherwise claimed very precise failures of Methodist's employees. When confronted by Methodist's motion for summary judgment, plaintiff realized that she would lose based on the specific claims contained in the second amended complaint. She therefore asked for leave to add a large number of new specific claims. The choice to leave these claims out of the pleadings for so long a time after plaintiff must

have known of them, suggests a doubt about being able to prove these failures or, if proved, that they caused Wanda's injuries.

Plaintiff asserts that Methodist would not be prejudiced if she is allowed to amend her complaint. We do not agree. First, the preceding complaints made very specific allegations, thus focusing the issues narrowly; it was not unreasonable for Methodist to be taken by surprise by the proposed complaint's new allegations. Second, Methodist moved for summary judgment based on the allegations contained in the second amended complaint, which if granted (as here), removes Methodist from this action. Third, it seems likely that Methodist, as it contends, would have to engage in substantial additional discovery and thus be prejudiced if plaintiff's proposed complaint were accepted. If amendment were permitted, Methodist's success in defeating all the claims in the second amended complaint would not end the lawsuit, and it would have to engage in a new contest on different issues—four years after the action was started.

There must be a point at which a plaintiff makes a commitment to the theory of its case. Here, the proposed complaint attempts to add a whole new theory of the case four years after this action was commenced, with no explanation as to why amendment did not take place sooner, except perhaps that plaintiff's attorney felt it was not necessary. But plaintiff had chosen to plead specific negligent acts and omissions in her second amended complaint, and preceding complaints. She did not merely allege that Methodist's agents and employees were negligent, but rather that certain Methodist agents and employees were negligent by reason of specific acts or omissions.

Dr. Zatuchni was first contacted by plaintiff with respect to this case in 1990; Mr. Nellis was contacted in October 1990. Presumably plaintiff's attorneys were informed of their experts' opinions before the experts were deposed in August and September 1991. However, even if we accept plaintiff's assertion that she had no knowledge of the

new allegations until the summer 1991 depositions, plaintiff did not move to amend her complaint at that time, but instead only sought to do so when faced with the likelihood that Methodist's motion for summary judgment would succeed.

We conclude that the district court did not abuse its discretion when it denied plaintiff's motion for leave to file a third amended complaint.

B. Summary Judgment

We review the district court's grant of summary judgment *de novo*. *AHP Subsidiary Holding Co. v. Stuart Hale Co.*, 1 F.3d 611, 615 (7th Cir. 1993). If a motion for summary judgment "is made and supported as provided in [Rule 56 of the Federal Rules of Civil Procedure] . . . an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *see also Valenti v. Qualix, Inc.*, 970 F.2d 363, 365 (7th Cir. 1992); *Wilson v. Williams*, 997 F.2d 348, 350 (7th Cir. 1993).

Plaintiff argued to the district court that it should look to evidence developed in discovery, and that "[t]he depositions of Plaintiff's experts and answers to interrogatories identify numerous issues of material fact to be determined by the fact finder." Apr. 22, 1992 Br. at 6-7. Plaintiff then discussed only those allegations which are contained in her proposed complaint, *id.* at 8-10, which complaint the district court had not allowed. Plaintiff did not address Methodist's showing on the issues raised by the second amended complaint, i.e. that the named doctors were not Methodist's agents, and that the three allegations against hospital employees regarding pelvic examination, availability of an internal pressure catheter, and identification of Wanda's infectious disease had no merit. In essence, it must have been plaintiff's position that because the second amended complaint alleged negligence in respects specifically described, it would permit plaintiff to claim and prove other and quite different negligent acts and omissions.

Plaintiff failed to timely file a statement of genuine issues with her opposing brief, as required by local rule, but later filed such a statement, as directed by the court. In her statement of genuine issues, plaintiff merely restated the new allegations contained in her proposed complaint.

The district court noted that plaintiff essentially conceded that Methodist is entitled to summary judgment on the specific claims of the second amended complaint, but rather urged that other claims of negligence exist which Methodist's summary judgment motion did not refute. The court concluded, however, that the additional claims do not fairly arise out of the second amended complaint.

Rule 8(a) of the Federal Rules of Civil Procedure requires that a plaintiff make a short and plain statement of claims. Certainly, facts in support of a claim are developed during the discovery process. However, in her first three complaints, plaintiff did not generally plead Methodist's negligence, but rather pled specific failures of the three named doctors, unnamed residents and hospital employees. Methodist and the court had no prior notice that the new allegations in the proposed complaint were the grounds for its claim of negligence against Methodist.

A complaint's allegations of negligence may be so specific that the plaintiff waives a claim of negligence based on other and different facts, particularly when plaintiff delays broadening the original claim. *Cf. American Nurses' Ass'n v. State of Ill.*, 783 F.2d 716, 724 (7th Cir. 1986) ("A plaintiff who files a long and detailed complaint may plead himself out of court by including factual allegations which if true show that his legal rights were not invaded."). The new allegations in the proposed complaint are distinct from the previous complaints, and thus could properly be deemed irrelevant. With respect to the claims in the second amended complaint, plaintiff failed to present any evidence showing genuine issues of material fact. When plaintiff chose to plead very specific negligent acts and failures, and delayed the pleading of additional acts and failures, she gave up any argument that Methodist had to show

the nonexistence of issues of fact as to the proposed additional claims as well. We conclude that the district court properly granted summary judgment in favor of Methodist.

C. Finding that Residents were not Methodist's Agents

In addition to plaintiff's general challenge to the district court's grant of summary judgment on the grounds that the court improperly ignored plaintiff's new allegations, plaintiff disputes the court's determination that there was no evidence sufficient to raise an issue as to whether or not the residents were Methodist's agents.

Plaintiff argues that determination of whether the residents referred to in the second amended complaint are Methodist's agents is a question of fact for the jury, in that the residents were given permission to perform services at Methodist, and Methodist billed the patients "for its services." The district court determined that plaintiff has no support for its claim regarding billing, and plaintiff advances no support to this court.

Whether there is an agency relationship between an individual health care provider and a hospital may appropriately be determined on summary judgment. *Northern Trust Co. v. St. Francis Hosp.*, 522 N.E.2d 699 (Ill. App. Ct.), *appeal denied*, 526 N.E.2d 833 (1988). Such is the situation in the present case.

The residents were unnamed in the complaints. Through discovery, Methodist learned that the allegations were against residents who accompanied Dr. Doughty; Dr. Wiser was then identified.

Methodist supplied the following evidence to the district court regarding Dr. Wiser: he was a resident of St. Francis Hospital; he saw Wanda under the supervision of Drs. Doughty and O'Connor, who were Assistant Professors at the University of Illinois College of Medicine, where Dr. Wiser was being trained; he was paid by St. Francis; he was not employed or paid by Methodist; and Methodist did not bill patients for his services.

In granting the motion for summary judgment, the court concluded that there was no agency relationship between the residents and Methodist, noting that plaintiff had merely argued that this issue is a question of fact. Plaintiff did not point to any facts in support of its position, to contradict Methodist's facts.[6] Plaintiff continues to argue that she "has presented sufficient evidence so that the issue of Dr. Hauser's[7] agency should go to the jury." May 14, 1993 Br. at 12. Nowhere does plaintiff discuss what evidence she has regarding any of the residents. Plaintiff has failed to meet her burden in presenting sufficient facts to show that a genuine issue of material fact exists with respect to the agency issue; in fact, plaintiff has presented no evidence. Therefore, the district court properly granted summary judgment in favor of Methodist.

Accordingly, we AFFIRM.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[6] Neither the district court or the parties cite any Illinois law regarding the factors to consider in determining agency in the medical context. Illinois has undergone some fluctuation in this area. *See UHR v. Lutheran Gen. Hosp.*, 589 N.E.2d 723 (Ill. App. Ct. 1992). The Illinois Supreme Court has recently ruled that a hospital may be vicariously liable for negligent acts of an emergency room physician under the doctrine of apparent authority. *Gilbert v. Sycamore Memorial Hosp.*, No. 74319, 62 U.S.L.W. 2289, 1993 WL 421663 (Ill. Oct. 21, 1993). Here, plaintiff advanced no argument or evidentiary support for a claim that the residents (or doctors) had apparent authority. Given the nature and circumstances of this case, we do not need to address the particular factors necessary to make a determination of agency under Illinois law.

[7] Plaintiff, for the first time on appeal, names another resident, Dr. Hauser. Dr. Hauser's involvement in this action was never presented to the district court, and therefore is not properly before this court.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 28, 1993

Before

Hon. RICHARD A. POSNER, *Chief Judge*
Hon. THOMAS E. FAIRCHILD, *Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*

DE ETTA JOHNSON, Individually and as Conservator of the Estate of WANDA JOHNSON and as Next Friend of DOMIAUANT JOHNSON,

Plaintiff-Appellant,

No. 92-2937 *v.*

METHODIST MEDICAL CENTER OF ILLINOIS,

Defendant-Appellee.

Appeal from the United States District Court
for the Central District of Illinois, Peoria Division
No. 88 C 1091—**Michael M. Mihm**, *Chief Judge.*

ORDER

On consideration of the petition for rehearing with suggestions for rehearing *en banc* filed in the above-entitled cause on December 14, 1993 by counsel for the plaintiff-appellant, all of the judges on the original panel have voted to DENY rehearing, and no judge in regular active service has requested a vote on the *en banc* suggestions. Accordingly,

IT IS ORDERED that the aforementioned petition for rehearing be, and the same is hereby DENIED.

[Filed June 26, 1992]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

Case No. 88-1091

DeETTA JOHNSON, Individually and as Conservator of the Estate of Wanda Johnson, and as next best friend of Domiauant Johnson, a minor,

Plaintiff,

v.

METHODIST MEDICAL CENTER OF ILLINOIS, ROBERT THOMPSON, M.D., STEPHEN DOUGHTY, M.D., and RICHARD O'CONNOR, M.D.,

Defendants.

ORDER

Before the court is the Defendant's motion for summary judgment (#99). For the reasons set forth below, this motion is granted.

BACKGROUND

The material facts do not appear to be in dispute. On June 30, 1982, Wanda Johnson was admitted to Methodist Hospital for delivery of a child. Wanda was only 14 years old at the time. After several hours of unsuccessful labor, a baby girl was delivered by Caesarean section. Wanda, however, remained hospitalized at Methodist for another two months. Apparently during the course of the delivery, Wanda suffered a serious infection which resulted in a hysterectomy and the removal of her ovaries and appendix. According to the complaint, Wanda also suffers from

severe emotional and psychiatric disorders as a result of her treatment and extended hospital stay. Wanda was adjudicated incompetent on February 19, 1988.

On March 18, 1988, the Plaintiff DeEtta Johnson filed this diversity action on behalf of Wanda against Methodist Hospital and various doctors who treated Wanda during her hospitalization. The current version of the complaint was filed on August 7, 1989. It contains four counts. Count I names Methodist Hospital, and Counts II through IV name doctors Robert Thompson, Stephen Doughty, and Rick O'Connor, respectively.

In Count I, the Plaintiff alleges that Methodist is liable for various acts and omissions of the treating physicians and other hospital staff. Specifically, the Plaintiff sets forth ten allegations of negligence in ¶10 of Count I. The first seven alleged errors in treatment by Drs. Thompson, Doughty, and O'Connor, as well as unnamed residents, and assert that the hospital is vicariously liable for such negligence. The final three allegations of ¶10 do not name a person or persons responsible. They allege that certain unnamed staff members of the hospital failed to perform a pelvic capacity examination, failed to have an internal pressure catheter available, and failed to identify the infectious disease suffered by Wanda.

On November 27, 1991, Methodist filed the pending motion for summary judgment on Count I. In that motion, Methodist argues that because the doctors and residents who treated Wanda were not employed by Methodist, it could not he held vicariously liable for their negligent acts. With respect to the final three allegations that claim that the hospital itself committed the negligent acts, Methodist argues that the undisputed facts show that there were no such failures by the hospital or its staff.

The Plaintiff initially responded to the summary judgment motion by seeking leave to file a third amended complaint. In that motion, the Plaintiff asserted that discovery had revealed other negligent acts not listed in the earlier complaint which were committed directly by the hospital staff or nurses. Methodist objected to the amendment on the grounds that it was untimely and introduced new theories of recovery which would necessitate additional discovery. At a hearing on April 3, 1992, this court agreed with Methodist that it was too late in the day for the Plaintiff's amendment and denied the motion for leave. The reason for this finding is more fully set forth in the transcript of the April 3, 1992 hearing. In any event, the Plaintiff then responded to Methodist's motion for summary judgment.

DISCUSSION

A motion for summary judgment should be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). A party who bears the burden of proof on a particular issue must, when confronted with a motion for summary judgment, affirmatively demonstrate by specific factual allegations that there is a genuine issue of material fact which requires trial. *Williams v. Williams Electronics*, 856 F.2d 920, 922 (7th Cir. 1988), *citing, Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). If the record taken as a whole could not lead a rational jury to find for the non-moving party, there is no genuine issue of material fact requiring trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

I. *Allegations of ¶10 of Second Amended Complaint*

Methodist's first argument is that it is entitled to summary judgment on ¶10(a)-(g) on the grounds that it cannot be held vicariously liable for the acts and omissions of the various doctors because there existed no agency relationship. Methodist cites to evidence in the record demonstrating that Drs. Thompson, Doughty, and O'Connor and any attending residents were not employed by the hospital nor in any way paid by the hospital for the care of Wanda. Those doctors provided those services directly to Wanda and billed for their services separately from the hospital. Moreover, the residents attending to Wanda were actually residents of St. Francis hospital, and were assisting in the treatment of Wanda under the supervision of the doctors. As noted by Methodist, under Illinois law, a hospital can only be held vicariously liable for the actions of an attending physician if such an employment or agency relationship exists. *Greene v. Rogers*, 147 Ill.App.3d 1009, 101 Ill.Dec. 543, 547, 498 N.E.2d 867 (3rd Dist. 1986); *Alford v. Phipps*, 169 Ill.App.3d 845, 119 Ill.Dec. 807, 815, 523 N.E.2d 563 (4th Dist. 1988).

The Plaintiff's response does not dispute this law, but rather argues simply that the issue of an agency relationship is a question of fact to be decided by the jury. *See* Illinois Pattern Instruction 50.05 ("if you find that a person has the right to control the activities of another at a given time, you may find that the relation of principal and agent exists, even though the right to control may not have been exercised.") However, the Plaintiff has offered no facts in the record which could lead a jury to find that such a relationship existed between the hospital and attending physicians. The only facts cited to the court are those referred by Methodist. Those facts establish a lack of any such relationship. When there is no reason-

able factual basis to support the opposing party's position, there is no question of fact for the jury to decide and the moving party is entitled to summary judgment. *See Matsushita*, supra. Accordingly, this court finds that Methodist cannot be held liable for the acts or omissions of the treating physicians under ¶10(a)-(g).

Methodist also seeks summary judgment on ¶10(h), in which the Plaintiff alleges that the hospital was negligent in failing to perform a pelvic capacity analysis on Wanda. According to the Plaintiff's expert, this is an examination of the mother to assess the size of the birth canal in relation to the size of the fetus. Methodist argues that it cannot be held liable for any such failure, because under Illinois law and in the opinion of Plaintiff's expert, such pelvic capacity examinations cannot be performed by hospital staff such as nurses, but rather must be performed by an obstetrician. The Plaintiff's response does not take issue with Methodist's argument, and offers no facts or law to support its claim that the hospital itself had a duty to perform this examination. Accordingly, Methodist is entitled to summary judgment on ¶10(h).

Methodist next argues that it is entitled to summary judgment on ¶10(i), in which the Plaintiff alleges that it was negligent in failing to have an internal pressure catheter available at the hospital to help treat Wanda. Methodist argues that the facts of record demonstrate that it did make available such a pressure catheter, and cites to the Plaintiff's own deposition testimony. In that deposition testimony, the Plaintiff relates that she was familiar with such hospital equipment through her prior employment as a nurses aide at Methodist and that she saw that an internal pressure catheter was used or available during Wanda's hospitalization for labor. Again, the Plaintiff offers no argument or evidence in opposition, and the

court accordingly finds that Methodist is entitled to summary judgment on ¶10(i).

Finally, Methodist moves for summary judgment on ¶10(j), in which the Plaintiff alleges that the hospital was negligent in failing to identify the infectious disease which afflicted Wanda during her hospitalization. In support of its motion, Methodist cites Illinois law which holds that the treatment of a patient is the duty of the treating physician, and not the hospital. *See Greene*, supra; *Johnson v. St. Bernard Hospital*, 79 Ill.App.3d 709, 35 Ill.Dec. 364, 369, 399 N.E.2d 198 (1st Dist. 1977). The Plaintiff has offered no argument in opposition to this law. Moreover, she has not cited to any expert testimony establishing the proper standard of care or that the hospital deviated from that standard, as required by Illinois law. *See Purtill v. Hess*, 111 Ill.2d 229, 95 Ill.Dec. 305, 310, 489 N.E.2d 867 (1986). As a result, this court finds that Methodist is entitled to summary judgment on the claim in ¶10(j) of Count I.

II. *Allegations in Third Amended Complaint*

In essence, the Plaintiff's response to concede that Methodist is entitled to summary judgment on all of the claims set forth in the second amended complaint. The Plaintiff does not seriously challenge the specific arguments made by Methodist with respect to the claims raised in ¶10(a)-(j). The Plaintiff does argue, however, that Methodist is not entitled to summary judgment because there exist *other* claims of negligence by the hospital on which there are triable issues of fact. In support of this argument, the Plaintiff lists various claims of negligence by hospital staff and nurses which are not contained in the second amended complaint, but rather are contained in the proposed third amended complaint.

Specifically, the Plaintiff lists all of the allegations of the proposed third amended complaint as providing genuine factual issues requiring trial. This list includes the following allegations:

1. Lack of communication between Labor and Delivery Room nurses and the medical staff after the 8:00 a.m. visit by Dr. Thompson.

2. The nursing staff failed to promptly communicate to Dr. Thompson and residents the rupture of Wanda Johnson's membranes at approximately 11:30 a.m.

3. The nursing staff failed to communicate that the fetal monitor strips were not calibrated correctly and were in error.

4. The nursing staff failed to chart the rupture of Wanda Johnson's membranes at approximately 11:30 a.m.

5. The nursing staff failed to communicate to Dr. Thompson and/or residents a decrease in variability noted in the fetal monitor strips.

6. The nursing staff negligently discontinued the fetal heart monitor, allowed at least one hour and twenty minutes with no fetal heart tone recording other than by stethoscope or doppler.

7. The nursing staff negligently performed numerous unnecessary vaginal examinations.

8. The nursing staff negligently introduced bacteria into Wanda Johnson's cervix through numerous unnecessary vaginal examinations.

9. The nursing staff at approximately 2:00 p.m. failed to obtain a clinical evaluation of Wanda Johnson with regard to the progress of labor.

10. Wanda Johnson was negligently given morphine by the nursing staff with a known allergy to the drug and without a physician's order.

11. The nursing staff failed to adequately evaluate Wanda Johnson's vital signs.

12. The hospital staff, including residents, failed to communicate the serious nature of Wanda Johnson's condition to Dr. Thompson on July 2, 1982.

13. The hospital staff, including residents, failed to perform a pelvic examination on July 2, 1982.

14. The hospital staff, including residents, failed to treat the infection of Wanda Johnson's cervix from July 2, 1982, until the time that Dr. Thompson performed the hysterectomy on July 9, 1982.

15. The hospital, as an institution, failed to timely transcript the surgical note concerning the C-section.

16. The hospital, as an institution, failed to monitor and oversee the clinical activities of its nursing staff, residents and house staff.

17. The hospital, as an institution, failed to have available an attending physician to provide continuous care to the patient.

18. The hospital, as an institution, failed to provide a timely document and medical record.

19. The hospital, as an institution, allowed residents and medical trainees to perform clinical evaluations of Wanda Johnson without adequate supervision.

20. The hospital, as an institution, did not provide required information and fetal monitor strips.

21. The hospital, as an institution, failed to properly report sensitivity results on the culture obtained from the peritoneal fluid on July 9, 1982.

22. The hospital, as an institution, did not provide policies and procedures that would allow its nursing staff to apply proper nursing care.

Even assuming that the record supports these claims against Methodist, they cannot serve to defeat summary judgment, because they are not contained in the second amended complaint. When new claims of liability are raised for the first time in response to a motion for summary judgment and are not contained in the pleadings, they need not be considered by the court. *See Fisher v. Metropolitan Life Insurance Company*, 895 F.2d 1073, 1078 (5th Cir. 1990); *Evans v. McDonald's Corp.*, 936 F.2d 1087, 1091 (10th Cir. 1991).

At the hearing on April 3, 1992, this court denied Plaintiff's request for leave to file a third amended complaint because it found that the request was not timely. After oral argument on May 14, 1992, this court is even more convinced that this was the correct ruling. The Plaintiff's counsel at that hearing could not provide a valid explanation as to why he had not earlier sought leave to amend the complaint to include these claims about which he had actual or constructive knowledge for years.

Given that the third amended complaint is not before the court, the claims contained therein will not be considered by the court. Those new claims of negligence are very different from the claims raised in the second amended complaint, which focused upon vicarious liability due to acts or omissions of the treating physicians. These new claims, listed above, cannot fairly be said to arise out of claims in ¶10 of the second amended complaint. Methodist

had every right to believe it was defending only those claims listed in the second amended complaint, and if the new claims were now to be considered by the court, Methodist would have to be given an opportunity to conduct discovery on these matters. As noted at the hearing on April 3, 1992, it is too late to open entirely new areas of inquiry in this litigation.

In short, the Plaintiff's attempt to inject the new allegations of negligence into this action was not timely. Given this ruling, and given the fact that those new allegations cannot be characterized as arising out of the claims in the second amended complaint, those new allegations cannot provide a genuine issue of *material* fact which would defeat summary judgment.

III. *Final Judgment Under 54(b)*

The Plaintiff argues that, in the event that summary judgment is entered in favor of Methodist, the court should enter final judgment on that claim pursuant to Federal Rule of Civil Procedure 54(b). That rule provides, in relevant part:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

Final judgments under Rule 54(b) should be entered sparingly, since they may cause piecemeal or duplicate review. *See Federal Deposit Insurance Corp. v. Elefant*, 790 F.2d 661, 665 (7th Cir. 1986). In deciding whether to enter such

a final judgment, a court should balance the judiciary's interest in unified review against a party's interest in immediate appeal. *See Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 100 S.Ct. 1460 (1980). If final judgment is necessary to a party and it would not pose a danger of repetitive or piecemeal review, then an entry under 54(b) would be appropriate. *Id. See also U.S. General v. Albert*, 792 F.2d 678 (7th Cir. 1986); *Schieffelin & Co. v. Valley Liquors, Inc.*, 823 F.2d 1064 (7th Cir. 1987).

Plaintiff argues that final judgment is appropriately entered here because there is no possibility of duplicative review and because there is a great need for immediate appeal of this court's entry of summary judgment in favor of Methodist. According to Plaintiff, this need results from the fact that the chances of settlement are much weaker with Methodist out of the case, and a reversal of the grant of summary judgment would bring Methodist back into the fold. Moreover, Plaintiff argues, if an appeal is delayed until after trial of the remaining counts and this court's grant of summary judgment is reversed, a second trial would be required.

In this court's view, this case presents a situation where a Rule 54(b) final judgment is appropriately entered. This court granted summary judgment to Methodist on the issue of agency. As far as this court is aware, the agency issue does not arise again in this lawsuit in the remaining claims, and therefore, the danger of duplicative appellate review is not present. Moreover, there is a need for immediate appeal, namely the court's need to avoid multiple trials. If the grant of summary judgment in favor of Methodist were to be reversed, it would be desirable for this to happen *before* the remainder of the case went

to trial, so that all claims could be tried together. Since the remainder of the case still has an extensive discovery schedule, it is possible that any such ruling from the court of appeals could precede the trial in this case. Accordingly, this court grants the Plaintiff's request for entry of final judgment under Rule 54(b).

CONCLUSION

For the reasons set forth above, the Defendant's motion for summary judgment (#99) is GRANTED. The Clerk is instructed to enter final judgment in favor of the Defendant Methodist Medical Center of Illinois and against the Plaintiff on Count I. This case is referred back to the Magistrate for the handling of any discovery matters, with the exception that no extensions are to be granted in the discovery schedule except by the district court.

ENTERED this 26th day of June, 1992.

/s/ MICHAEL M. MIHM
Michael M. Mihm
United States District Judge

United States District Court
for the Central District of Illinois
July 30, 1992

Case Minutes — General

Case No. 1:88-cv-01091

Title: Johnson v. Methodist Medical

*** DATE OF OCCURRENCE: 7/30/92 ***

DOCKET ENTRY

MINUTE-ENTRY: by Chief Judge Michael M. Mihm denying motion for reconsideration of Order Granting Summary Judgment to Defendant, Methodist Medical Center of Illinois [159-1] (cc: all counsel)

[Filed February 1, 1993]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

AMENDED PARTIAL FINAL
JUDGMENT IN A CIVIL CASE

Case Number: 88-1091

DEETTA JOHNSON, individually
DEETTA JOHNSON, as Conservator of the Estate of WANDA JOHNSON
DEETTA JOHNSON, as next best friend of DOMIAUANT JOHNSON, a minor

VS

METHODIST MEDICAL CENTER OF ILLINOIS
ROBERT THOMPSON, M.D.
STEPHEN DOUGHTY, M.D.
RICK O'CONNOR, M.D.

☒ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of the defendant, Methodist Medical Center of Illinois pursuant to Rule 54(b) as there is no just reason for delay from entry of judgment and against the plaintiff, DeEtta Johnson on Count I.

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED

February 1, 1993

/s/ JOHN M. WATERS
Clerk

/s/ HOLLY WILLIAMS
(By) Deputy Clerk

Supreme Court, U.S.
FILED
APR 26 1994
OFFICE OF THE CLERK

No. 93-1548

In The

Supreme Court of the United States

October Term, 1993

DeETTA JOHNSON, Individually and as Conservator of the Estate of Wanda Johnson, and as Next Best Friend of Domiauant Johnson, a Minor,

Petitioner,

v.

METHODIST MEDICAL CENTER OF ILLINOIS,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the District Court properly granted summary judgment to Defendant Methodist on the claims of the Second Amended Complaint, not considering evidence on claims in the proposed Third Amended Complaint (which the Court had denied leave to file).

2. Whether the District Court abused its discretion in denying Plaintiff's Motion for Leave to file a Third Amended Complaint made 10 years after the incident in question and 4 years after suit had initially been filed, when Plaintiff has given no explanation for the delay, the proposed Complaint asserted 21 new theories of liability, and additional and repeat discovery would be required.

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No. 93-1548

In The

Supreme Court of the United States

October Term, 1993

DeETTA JOHNSON, Individually and as Conservator of the Estate of Wanda Johnson, and as Next Best Friend of Domiauant Johnson, a Minor,

Petitioner,

v.

METHODIST MEDICAL CENTER OF ILLINOIS,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

Methodist Medical Center of Illinois respectfully requests this Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit. Respondent seeks affirmance of the District Court's Order denying Petitioner leave to file a Third Amended Complaint, and granting summary judgment on the allegations of the Second Amended Complaint.

In her Petition for Certiorari, Plaintiff-Petitioner urges review of a District Court Decision which first denied Plaintiff leave to file a Third Amended Complaint and then granted a Motion for Summary Judgment on

Plaintiff's Second Amended Complaint. The Circuit Court of Appeals unanimously affirmed. As described herein, certiorari should be denied in this case because:

1. The Court of Appeals correctly recognized that denying leave to file a Third Amended Complaint was a matter confided to the discretion of the District Court, and Plaintiff's unexplained and lengthy delay is a proper basis under traditional principles for denying such a motion;

2. When Plaintiff now argues that the delay was due to Defendant hospital, Plaintiff is making an argument not presented to the District Court, and under traditional principles of appellate procedure such an argument should not be considered at all;

3. In the two Courts below Plaintiff did not seriously contest Defendant hospital's Motion for Summary Judgment on the allegations of malpractice contained in the Second Amended Complaint;

4. Under traditional principles, neither the District Court nor the Circuit Court of Appeals are obliged to consider new claims raised for the first time in response to a Motion for Summary Judgment which are not contained in the pleadings;

5. The Circuit Court of Appeals' Decision is not in conflict with any Decision of this Court or any other Court of Appeals; and

6. The Court of Appeals' Decision was correct.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rule 11, F.R.Civ.P. Signing of Pleadings, Motions, and Other Papers, Sanctions.

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record . . . The signature of an attorney or party constitutes a certificate by the signer that . . . to the best of the signer's knowledge, information, and belief *formed after reasonable inquiry it is well grounded in fact* . . . (As amended Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987.) (emphasis added).

Rule 15, F.R.Civ.P. Amended and Supplemental Pleadings.

> **(a) Amendments.** A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. *Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party;* . . . (Emphasis added.)

Rule 56, F.R.Civ.P. Summary Judgment

> **(c) Motion and Proceedings Thereon.** . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact

and that the moving party is entitled to a judgment as a matter of law. . . .

§ 71, Ch. 51, *Ill.Rev.Stat.* (1981)
(now 735 ILCS 5/8-2001)

Every private and public hospital shall, upon the demand (now "request") of any patient who has been treated in such hospital and after his discharge therefrom, permit the patient, his physician or authorized attorney to examine the hospital records. . . . and permit copies of such records to be made by him . . .

§ 2-622, Ch. 110, *Ill.Rev.Stat.* (1987)
(now 735 ILCS 5/2-622)

§ 2-622. Healing art malpractice. (a) In any action, whether in tort, contract or otherwise, in which the plaintiff seeks damages for injuries or death by reason of medical, hospital, or other . . . , the plaintiff's attorney or the plaintiff . . . shall file an affidavit, attached to the original and all copies of the complaint, declaring one of the following:

1. That the affiant has consulted and reviewed the facts of the case with a health professional . . . *that the reviewing health professional has determined in a written report, after a review of the medical record and other relevant material involved . . . that there is a reasonable and meritorious cause for the filing of such action;* and that the affiant has concluded on the basis of the reviewing health professional's review and consultation that there is a reasonable and meritorious cause for filing of such action . . . A copy of the written report [of the health professional], clearly identifying the plaintiff and the reasons for the reviewing health professional's

> determination that a reasonable and meritorious cause for filing of the action exists, must be attached to [the attorney's] affidavit. . . . (emphasis added).

STATEMENT OF THE CASE

Plaintiff's daughter, Wanda Johnson, was hospitalized at Methodist Medical Center of Illinois from June 30 to August 24, 1982. She had entered the hospital at 3:00 a.m. on June 30 in labor, and a Caesarian section was performed by her obstetrician at 5:30 p.m. on that date. She developed an infection, which resulted in injury to her.

In August of 1982, copies of the hospital chart were procured by former attorneys for Plaintiff. On March 18, 1988, Plaintiff filed this medical malpractice action against the hospital and others, basically alleging that Drs. Thompson (obstetrician) and Doughty (internist) were agents of the hospital and the hospital was vicariously liable for their negligence.

On July 7, 1989, Plaintiff filed an Amended Complaint. This contained the same allegations of malpractice as the original Complaint, but added new charges of claimed malpractice of residents of other hospitals, Dr. O'Connor and the Infectious Disease Control Program. It was claimed that Dr. O'Connor (internist) and the unnamed residents of other hospitals were agents or servants of Defendant hospital. On August 7, 1989, Plaintiff filed a Second Amended Complaint, making no material changes as to the Defendant hospital.

Dr. Zatuchni's deposition was taken on August 23, 1991. In his deposition, this Plaintiff's expert acknowledged that most of the criticisms listed in the Answers to Interrogatories concerning him were in fact criticisms of the doctors rather than the hospital. He also stated that the many new claims of malpractice he articulated in his deposition, concerning such matters as the claimed failure of the hospital staff and the nurses to communicate, were not disclosed in those Answers to Interrogatories.

The deposition of the other Plaintiff's expert, Mr. Nellis, was taken on September 16, 1991. We were provided with a 10-page single-spaced outline of his opinions as we walked into the deposition room just minutes before the deposition began.

On November 27, 1991, Defendant hospital filed its Motion for Summary Judgment based on the allegations contained in the pending Second Amended Complaint. On January 13, 1992, Plaintiff moved for leave to file a Third Amended Complaint, asserting 21 new theories of liability against Defendant hospital. That Motion for Leave to File was denied by the District Court on April 3, 1992. Counsel for Plaintiff offered no reason for the delay in presenting the new theories. Calling the attempt to amend "unconscionable", the District Court denied the Motion for Leave to Amend, stating "[t]his case is going to have a beginning and a middle and an end just like every other case".

On June 26, 1992, the District Court granted Defendant hospital's Motion for Summary Judgment, noting that Plaintiff did not "seriously challenge" the specific arguments which had been made in support of the

Motion for Summary Judgment on the Second Amended Complaint. Pet. at A. 19.

The Circuit Court of Appeals held that the District Court did not abuse its discretion in denying Plaintiff's Motion for Leave to File a Third Amended Complaint, saying "[t]he proposed Complaint attempts to add a whole new theory of the case four years after this action was commenced, with no explanation as to why amendment did not take place sooner, except perhaps that Plaintiff's attorney felt it was not necessary". Pet. at A. 8. The Circuit Court affirmed the District Court's grant of summary judgment on the allegations of the Second Amended Complaint, saying that "Plaintiff did not address Methodist's showing on the issues raised by the Second Amended Complaint" that Plaintiff's claims "had no merit". Pet. at A. 9.

REASONS FOR DENYING THE WRIT

In general, the Petition should be denied because the case has been decided using traditional rule-based principles of both trial and appellate practice. There are no special or important reasons for granting certiorari.

I. The District Court properly exercised its discretion in denying Plaintiff's Motion for Leave to File a Third Amended Complaint made 10 years after the incident in question and 4 years after suit had initially been filed, when Plaintiff gave no explanation for the delay, the proposed Complaint asserted 21 new theories of liability, and additional and repeat discovery would be required.

It is axiomatic that a Motion for Leave to File an Amended Complaint is addressed to the sound discretion

of the District Court. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330, 28 L. Ed. 2d 77, 87 (1971). Having observed first hand a party's diligence or lack thereof, the trial judge is particularly well situated to determine the worthiness of a Motion to Amend. *Amendola v. Bayer*, 907 F.2d 760, 764 (7th Cir. 1990).

Reasons sufficient to deny leave to amend in the exercise of the District Court's discretion, are: 1) undue delay; 2) bad faith or dilatory motive of movant; 3) previous failure to cure deficiencies in the complaint; 4) undue prejudice to opponent; and 5) futility of the amendment. *Foman v. Davis*, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 226 (1962). Any one of those reasons standing alone is sufficient to deny leave to amend, and all are present here.

First, the proposed Third Amended Complaint was offered 10 years after the incident in question and 4 years after suit was filed. This is undue delay. We must note that Illinois law does allow some pre-suit discovery by requiring that hospitals provide their patient's records to the patient's attorneys on demand even before suit is filed. § 71, Ch. 51, *Ill.Rev.Stat.* (1981) (now 735 ILCS 5/8-2001). Illinois substantive law requires that Plaintiff in a malpractice action have the hospital chart reviewed by an expert before suit is filed so as to certify that there is a reasonable and meritorious cause for filing such an action. § 2-622, Ch. 110, *Ill.Rev.Stat.* (1987) (now 735 ILCS 5/2-622). Also, Federal Rules provided that an attorney's signature on a complaint is to be a certificate that "to the best of the signer's knowledge, information, and belief formed *after reasonable inquiry* it is well grounded in fact . . . ". *Rule 11, F.R.Civ.P.* (emphasis added). Here, the

hospital chart was provided to former attorneys for Plaintiff in August of 1982, six years before suit was filed. In short, applicable law requires that Plaintiff have experts review the hospital chart before suit is filed, not years after filing suit.

Second, it is Plaintiff's obligation to explain the reason for the delay. Here, Plaintiff has offered no explanation whatsoever. It is clear that "where . . . a considerable period of time has passed between the filing of the complaint and the motion to amend", the movant has the burden of showing "some 'valid reason for his neglect and delay' (citations omitted)". *Hayes v. New England Millwork Distributors, Inc.*, 602 F.2d 15, 19-20 (1st Cir. 1979) (and cases collected therein). There are unanswered questions here. Why was the hospital chart not properly reviewed by an obstetrician in the 6 years before suit was filed? Why was Dr. Zatuchni, the obstetrician acting as Plaintiff's expert, not contacted until 1990, 8 years after the occurrence and 2 years after suit was filed? When the expert interrogatories were answered in January of 1991, 3 years after suit was filed, why were the 21 new claims not then described? Why did Defendant hospital have to wait until the expert's deposition in August of 1991, 3½ years after suit was filed, to first learn of these 21 new claims of malpractice? Plaintiff has not answered these questions and offers no explanation for the delay in raising these 21 new claims.

Third, the proposed Third Amended Complaint was the last in a long series of fruitless efforts to make a claim against Defendant hospital. (1) The original Complaint of March 1988 had focused on the contention that Drs. Thompson and Doughty were employees of the hospital,

and that the hospital was therefore vicariously liable for their claimed malpractice. It was promptly learned through Answers to Interrogatories that this contention was untrue, and that Plaintiff did not even have witnesses or documentation to lend support to the claim of an agency relationship. (2) The Amended and Second Amended Complaints filed in the summer of 1989 restated the same contentions as before, and added the contentions that Dr. O'Connor and certain unnamed residents of other hospitals were guilty of malpractice and were likewise employees of the hospital. It was then demonstrated that this contention was likewise untrue. Those 1989 pleadings also contended that the hospital was negligent in the operation of its Infectious Disease Control Program, but the November 1990 deposition of Dr. Snydman, Plaintiff's expert on infectious diseases, established that even he was of the opinion that the Defendant hospital was not negligent in that regard. (3) In the November 1990 deposition of Dr. Snydman, it was claimed that Defendant hospital was guilty of malpractice for failure to report drug sensitivity of a particular culture. However, Defendant hospital later demonstrated that the decision to test or not to test for drug sensitivity was a decision not made by any agent of the hospital. (4) In January of 1991, Plaintiff answered interrogatories about the opinions of Dr. Zatuchni concerning hospital malpractice on such matters as pre-eclampsia, pelvic assessment during labor and other matters. However, in his deposition of August of 1991, it was determined that these new charges could not be supported. (5) It was then, in August of 1991, when we first began to learn of the 21 new theories of malpractice which Plaintiff later

wished to add in the Third Amended Complaint. To put it plainly, enough is enough. A Defendant should not have to endlessly battle whole new sets of charges of malpractice where the history of the litigation is one of new claims constantly defeated.

Fourth, had the Motion for Leave to File the Third Amended Complaint been granted, Defendant hospital would have been prejudiced. As mentioned, the previous pleadings had focused on the contention that various doctors and residents were employees of the hospital, a contention that proved to be false. The District Court correctly observed that these new claims were "very different" from the claims raised in the Second Amended Complaint, and "cannot fairly be said to arise out of" those previous claims. Pet. at A. 22-23. The Circuit Court correctly observed that the proposed Complaint "attempts to add a whole new theory of the case". Pet. at A. 8. Both Courts rightly concluded that Defendant hospital would have to be given the opportunity for new discovery concerning the new claims. *Id.*

After all, Defendant hospital did not learn any of the 21 new claims of malpractice of these two experts until the very days of their respective depositions, at what was supposed to be the end (not the beginning) of discovery of Plaintiff's case. These 21 new contentions later surfaced in the proposed Third Amended Complaint. It had not been previously contended that the labor and delivery room nurses were guilty of malpractice in any regard, but the new pleading would have stated 11 charges of misconduct by them. Pet. at A. 5. There had been no prior claims that the "hospital staff" was guilty of any malpractice, but the proposed Complaint charged the staff (without identifying any particular person) with 3 acts of

malpractice. Pet. at A. 5-6. We must note that the medical staff at that time included 257 physicians and the hospital had literally thousands of employees. There had been no prior claim of any malpractice by the hospital as an institution, but the proposed Complaint contained 7 charges against the institution. Pet. at A. 6. New and repeat discovery would have been required. The proposed Complaint would have alleged new and different misconduct (*e.g.* failure to communicate) by new and different persons (*e.g.* the labor and delivery room nurses) concerning new and different procedures or events (*e.g.* the rupture of the membranes).

In summary, the District Court has discretion to deny a Motion for Leave to Amend. Here, there was a 4 year delay in Plaintiff's presentation of 21 entirely new claims of malpractice, and Plaintiff offered no explanation whatsoever for the delay. Allowing injection of the 21 new theories into the case (when discovery was supposed to be ending, not beginning) would have required additional and repeat discovery. This was but the last in a long series of fruitless attempts to make out a claim against Defendant hospital. The District Court properly exercised its discretion in denying Plaintiff's Motion for Leave to File a Third Amended Complaint.

II. Plaintiff's claim that the delay was due to Defendant hospital was not raised before the District Court, and should not be considered by this Court.

Plaintiff's Petition argues that the delay in presenting her Third Amended Complaint was occasioned by Defendant hospital's Motions to Dismiss and a lackadaisical

attitude toward taking the depositions of Plaintiff's experts. Pet., p. 9. This contention was not raised before the District Court. It is fundamental that on appeal, a litigant is restricted to those arguments which have been raised at the District Court level. *Singleton v. Wulff*, 428 U.S. 106, 120, 49 L. Ed. 2d 826, 837 (1976). Accordingly, this argument should not be considered on appeal to this Court.

There are important practical considerations behind this principle as it applies here. First, the issue of leave to file an amended pleading is confided to the District Court's sound discretion, and that Court is particularly well-suited to assess diligence or lack thereof having observed the case throughout its development. *Amendola v. Bayer*, 907 F.2d 760, 764 (7th Cir. 1990). Second, where such an argument is raised for the first time on appeal, the opponent of the argument is deprived of the opportunity to make a record by submitting such documents, affidavits or other materials as may be available to refute the argument.

In the present case, Plaintiff first argues that it was Defendant hospital's motion practice which delayed the disposition of the case. Pet., pp. 9-12. Plaintiff implies, but does not expressly claim, that discovery was at a halt while that motion practice proceeded. That implication is untrue. For example, written discovery began with interrogatories in May of 1988. Sixteen depositions were taken before the depositions of the experts at issue. Those depositions were: (1) Plaintiff (October 6, 1988); (2-6) Tamela Brown, Imogene Jackson, Helen Lewis, Diane Macklin and Stanley Macklin (* March 31, 1989); (7) Defendant Robert Thompson, M.D. (May 11, 1989); (8) Defendant

Steven Doughty, M.D. (May 23, 1989); (9) Defendant Richard O'Connor, M.D. (August 10, 1989); (10) Nelda Bevill, R.N. (* October 17, 1989); (11) resident Herbert Wiser, M.D. (January 8, 1990); (12) Plaintiff's expert Alan Spector (* October 23, 1990); (13) Plaintiff's expert Richard Snydman, M.D. (November 12, 1990); (14) Plaintiff's expert Russell Glantz, M.D. (* January 20, 1991); (15) Michael Veeder, M.D. (* May 15, 1991); and (16) John Taraska, M.D. (* May 28, 1991). In addition, Defendant hospital propounded 7 sets of Supplemental Interrogatories in an attempt to find out the nature of Plaintiff's claims of malpractice. As can be seen, discovery proceeded apace while the motion practice pursued its parallel course.

Plaintiff also argues that Defendant hospital unduly delayed 15 months in deposing expert Zatuchni and 7 months in deposing Mr. Nellis. Pet., pp. 9-12. Under a scheduling order adopted by the District Court, depositions of Plaintiff's experts were to be concluded by May 31, 1990. However, it was Plaintiff's late disclosure of two new experts (Dr. Zatuchni and Mr. Nellis) on May 14 and December 7, 1990, which forced an extension of discovery deadlines. Subsequently, a struggle ensued to secure answers to interrogatories listing the opinions of these experts before their depositions could be taken:

12/07/90 Nellis disclosed as expert in supplemental answer to interrogatories (7 months late);

12/20/90 Defendant hospital propounds Fourth Supplemental Interrogatories re: Mr. Nellis;

01/07/91 Plaintiff answers Third Supplemental Interrogatories re: Dr. Zatuchni (approximately 7 months late);

01/30/91 Notice for deposition of Mr. Nellis;

02/04/91 Letter from counsel for Defendant hospital to Plaintiff's counsel re: failure to answer interrogatories on Mr. Nellis;

02/14/91 Letter from counsel for Defendant hospital to Plaintiff's counsel re: failure to answer interrogatories on Mr. Nellis;

03/15/91 Letter from counsel for Defendant hospital to Plaintiff's counsel re: failure to answer interrogatories on Mr. Nellis;

04/01/91 Defendant hospital files Motion to Compel re: Answers to Interrogatories on Mr. Nellis;

05/13/91 Joint motion to extend time based on impossibility of scheduling doctors' depositions;

05/16/91 Plaintiff answers Fourth Supplemental Interrogatories re: Mr. Nellis (3 months late);

06/28/91 Court grants Motion to Compel, Plaintiff to comply within 10 days;

* 07/15/91 Letter from counsel for Defendant hospital to Plaintiff's counsel re: compliance with 6/28 order and

requesting dates for Nellis and Zatuchni depositions;

07/29/91 Notice for deposition of Dr. Zatuchni;

* 08/16/91 Letter from Plaintiff's counsel; advises Nellis is available for deposition; on September 16, 1991;

08/23/91 Dr. Zatuchni deposition taken; and

09/16/91 Mr. Nellis deposition taken.

As can be readily seen, the delay of which Plaintiff speaks came about because of Plaintiff's failure to comply with discovery requests concerning these two expert witnesses.

In the last 2 paragraphs, the items marked with an asterisk (*) are not contained in the record. We did not file those letters and depositions with the District Court because Plaintiff did not make this argument before that Court. For the same reason, we did not make a record of the fact that Plaintiff wished the depositions of her experts delayed until such time as she completed depositions of other persons. We suggest these facts only to illustrate how an appellant or respondent can be prejudiced when an appellee or petitioner raises an argument not raised before the District Court.

It is fundamental that a court of review will not consider arguments not raised before the District Court, and this particular argument was not raised there. The two practical reasons for application of this principle here are that: (a) the District Court, having followed the case

throughout its history, is in the best position to judge who has been diligent and who has not been diligent; and (b) allowing such an argument to be raised for the first time on appeal deprives the opponent of the argument the opportunity to make of record facts which could counter the argument.

III. Summary judgment was properly granted on the allegations of malpractice in the Second Amended Complaint because there was no genuine issue as to certain material facts.

If the record taken as a whole could not lead a rational jury to find for the opponent of the motion, there is no genuine issue of material fact requiring trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 552 (1986). Summary Judgment is to be granted where there is no genuine issue as to the material facts. Rule 56(c), *F.R.Civ.P.*

The first seven allegations of malpractice contained in the Second Amended Complaint were that Drs. Thompson, Doughty and O'Connor, as well as unnamed residents from other hospitals, committed malpractice, and that Defendant hospital was vicariously liable because they were agents of the hospital. The District Court found the agency argument to be meritless. The Court found persuasive the fact that the doctors were not employed by the hospital, not in any way paid by the hospital for the care of the patient, and billed separately for their services, among other reasons. Pet. at A. 17. Another allegation in the Second Amended Complaint was that the hospital was negligent in failing to perform a

pelvic capacity analysis on the patient. As noted by the District Court, Plaintiff's own expert testified that such an examination cannot be performed by hospital staff members such as nurses, but rather must be performed by an obstetrician. Pet. at A. 18. The Complaint further alleges that the hospital was negligent for failure to provide an internal pressure catheter. As found by the District Court, that contention was refuted by Plaintiff's own testimony. Pet. at A. 18-19. Finally, the Complaint asserted that the hospital was negligent for failure to identify the infectious disease contracted by Plaintiff's daughter. The District Court found that Plaintiff had not presented the required expert proof to support this claimed standard of care. Pet. at A. 19. The District Court correctly noted that Plaintiff "does not seriously challenge" the arguments made by Defendant hospital on these claims of malpractice. Pet. at A. 19.

In short, there is no genuine dispute of material fact as to the claims of malpractice alleged in the Second Amended Complaint. Rather than challenge Defendant's Motion for Summary Judgment by presenting opposing contentions of fact before the District Court, the Plaintiff elected to argue that claims not made in the Second Amended Complaint should be litigated, even after the District Court had denied leave to file the Third Amended Complaint containing those 21 new claims.

IV. When new claims of liability are raised for the first time in response to a Motion for Summary Judgment, and are not contained in the pleadings, they need not be considered by the Court.

When new claims of liability are raised for the first time in response to a Motion for Summary Judgment, and are not contained in the pleadings, they need not be considered by the Court. *Fisher v. Metropolitan Life Ins. Co.*, 895 F.2d 1073, 1078 (5th Cir. 1990); and *Evans v. McDonald's Corp.*, 936 F.2d 1087, 1091 (10th Cir. 1991). In this case, Defendant hospital filed its Motion for Summary Judgment on November 27, 1991. Plaintiff then responded by moving on January 13, 1992, for leave to file her Third Amended Complaint asserting 21 new theories of malpractice.

It would be meaningless to say that a District Court has discretion to deny a motion for leave to amend if, thereafter, a party could freely assert every contention which it had been denied leave to make a part of its pleadings. Rule 15 provides that after a responsive pleading has been filed, a party may amend only by leave of court. Rule 15, *F.R.Civ.P.* This Court went to considerable trouble in *Foman* to lay down considerations such as undue delay which could properly guide a District Court in the exercise of that discretion. *Foman v. Davis*, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 226 (1962). This is a useless exercise if a party may assert in opposition to summary judgment the very contentions that party was denied leave to make a part of its pleadings. If the discretion contained in Rule 15 means anything, it means that claims which a party has been denied leave to file may

not be further considered, absent a finding that the District Court was in error in refusing leave to amend.

Even notice pleading requires that the complaint give "fair notice of what plaintiff's claim is and *the grounds upon which it rests*". *Leatherman v. Tarrant County*, 507 U.S. ___, 122 L. Ed. 2d 517, 524 (1993) (emphasis added), quoting *Conley v. Gibson*, 355 U.S. 41, 47, 2 L. Ed. 2d 80, 85 (1957). Both the District Court and the Court of Appeals correctly observed that the 21 new charges of malpractice presented entirely new and different grounds for recovery. Pet. at A. 22-23, & A. 8.

Claims not contained in the pleadings are simply not before the Court for consideration. Rule 56 requires that the Court decide whether there are genuine issues of material fact. Rule 56, *F.R.Civ.P.* The only evidentiary dispute which will bar summary judgment is a dispute of material fact; an evidentiary difference as to an immaterial matter will not bar a summary judgment. *Robbins v. Gould*, 278 F.2d 116, 120 (5th Cir. 1960). A material fact is one which is outcome-determinative under prevailing law. *Holloway v. Pigman*, 884 F.2d 365, 366 (8th Cir. 1989). A claim not raised in the pending complaint, but raised only in response to a motion for summary judgment, is not outcome-determinative because it is not properly before the court. *Fisher v. Metropolitan Life Ins. Co.*, 895 F.2d 1073, 1078 (5th Cir. 1990).

There are a number of articulated purposes for having a rule providing for motions for summary judgment. Respected commentators have stated that "the rule is intended *to prevent vexation and delay*, improve the machinery of justice, *promote the expeditious disposition of*

cases, and avoid unnecessary trials when no genuine issues of fact have been raised." Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d*, § 2712, pp. 564-567 (emphasis added). These objectives of Rule 56 would be frustrated if a party could endlessly amend pleadings to assert new claims, or if a party could defeat a summary judgment by raising alleged factual disputes outside the scope of the pleadings before the Court.

The District Court constantly accommodated Plaintiff by extending deadlines for disclosure of additional experts and opinions. For example, the Minute Order of December 14, 1989, directed that discovery concerning Plaintiff's experts be completed by March 1, 1990. The Minute Order of March 2, 1990, extended the deadline for depositions of Plaintiff's experts to the end of May, 1990. Plaintiff made late disclosure of the two experts now in dispute, and the District Court again accommodated in Minute Orders of December 14, 1990, and June 28, 1991 by extending the deadline for completion of the depositions of Plaintiff's experts to September 30, 1991. It was only in the depositions of August and September 1991 that Plaintiff first articulated any of the 21 new contentions.

As shown above (this brief, pp. 9-11), the 21 new contentions raised for the first time during the depositions of the experts (who themselves were untimely disclosed under the Court's earlier deadlines), are but the most recent in a long series of baseless charges of malpractice lodged against Defendant hospital. On all previous attempts, Defendant hospital had proved that Plaintiff's contentions of malpractice were manifestly untrue. Even without the additional discovery which

Defendant hospital felt would be necessary on the 21 new charges, the hospital has been able to demonstrate that at least half of the new charges can already be proven to be baseless.

All lawsuits must end sometime. No defendant should be required to face an endless series of claims of malpractice against it. A proper way to put an end to such baseless claims is through the application of Rules 15 and 56, as was done here. In ruling on a Motion for Summary Judgment, the District Court need not consider evidence on contentions which, in the exercise of its discretion, it has denied Plaintiff leave to file. On summary judgment the District Court can properly disregard contentions not contained in the pleadings and raised for the first time in opposition to the Motion for Summary Judgment. No other procedure will bring an end to baseless litigation such as this.

CONCLUSION

The Petition for Writ of Certiorari should be denied. Plaintiff's daughter was hospitalized in the summer of 1982, and former attorneys for Plaintiff procured copies of the hospital chart as soon as she was out of the hospital.

The District Court properly exercised its discretion in denying Plaintiff leave to amend, when Plaintiff sought to assert new and different grounds for recovery at a point in time when discovery of Plaintiff's case was supposed to be ending (not beginning). That motion was made 10 years after the incident in question and 4 years after suit

had been filed, and Plaintiff articulated no reason for this delay.

Plaintiff now claims that the delay was due to defendant hospital, but this argument was not raised before the District Court and should not be considered now. The District Court is in the best position to judge diligence or lack of diligence, and raising the matter this time deprives defendant hospital of the opportunity to present facts to counter that new argument.

In the Petition, as before the Circuit and District Courts, Plaintiff does not assert that there is a genuine issue of material fact on the allegations of malpractice in the Second Amended Complaint. There is simply no dispute on those alleged facts, and summary judgment was properly granted.

After defendant hospital's motion for summary judgment was filed, Plaintiff attempted to raise 21 new contentions of malpractice not contained in the pleadings. When new claims of liability are raised for the first time in response to a motion for summary judgment and are not contained in the pleadings, they need not be considered by the Court. This is especially so where, as here, Plaintiff has properly been denied leave to file the new claims, and the new claims are but the most recent in a long series of fruitless attempts to make out a claim against defendant hospital. Fundamentally, it is too late to start over.

The Respondent, METHODIST MEDICAL CENTER OF ILLINOIS, INC., prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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